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Attorneys for Plaintiffs
CORY SPENCER, DIANA MILENA
REED, and COASTAL PROTECTION
RANGERS, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

CORY SPENCER, an individual;
DIANA MILENA REED, an
individual; and COASTAL
PROTECTION RANGERS, INC., a
California non-profit public benefit
corporation,

Plaintiffs.

CASE NO. 2:16-cv-02129-SJO (RAOx)

**PLAINTIFFS' RESPONSE TO
DEFENDANTS CHARLIE AND
FRANK FERRARA'S OBJECTIONS
TO MAGISTRATE JUDGE OLIVER'S
REPORT AND RECOMMENDATION**

1
2 v.

3 LUNADA BAY BOYS; THE
4 INDIVIDUAL MEMBERS OF THE
5 LUNADA BAY BOYS, including but
6 not limited to SANG LEE, BRANT
7 BLAKEMAN, ALAN JOHNSTON
8 AKA JALIAN JOHNSTON,
9 MICHAEL RAE PAPAYANS,
10 ANGELO FERRARA, FRANK
11 FERRARA, CHARLIE FERRARA,
and N. F.; CITY OF PALOS VERDES
ESTATES; CHIEF OF POLICE JEFF
KEPLEY, in his representative
capacity; and DOES 1-10,

12 Defendants.
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Complaint Filed: March 29, 2016
Trial Date: December 12, 2017

1 **I. INTRODUCTION**

2 In their challenge to Judge Oliver's Report and Recommendation, the Ferrara
3 Defendants do not dispute the Court's findings that they failed to take reasonable
4 steps to preserve electronically stored information (ESI) that should have been
5 preserved, that evidence was lost as a result, and that it cannot be restored or
6 replaced through additional discovery. Nor do the Ferraras dispute Judge Oliver's
7 finding that Plaintiffs have suffered and will continue to suffer prejudice from the
8 loss of the electronic evidence.

9 Instead, the Ferraras argue this Court may not issue monetary sanctions to
10 cure the undisputed prejudice. But neither the fact that they already paid some
11 monetary sanctions for violating a Court Order, nor the fact that Plaintiffs did not
12 specifically seek monetary sanctions through their Motion for Evidentiary
13 Sanctions, divests the Court of its broad discretion in selecting an appropriate
14 sanction to remedy Plaintiffs' prejudice. Moreover, Defendants' assertion that they
15 have been deprived of notice and an opportunity to be heard with respect to the
16 appropriate sanction is belied by the hearing transcript on this motion, as well as the
17 Report and Recommendation. Because this Court is authorized to award additional
18 monetary sanctions for prejudice caused by the Ferraras' spoliation of evidence, the
19 Report and Recommendation should be adopted in full.

20 **II. RELEVANT PROCEDURAL HISTORY**

21 In November 2016, Plaintiffs served Defendants Charlie and Frank Ferrara
22 with document requests. (Pltfs.' Mem. P. & A. Supp. Mot. for Monetary Sanctions
23 (Pltfs.' Monetary Motion), Dock. No. 403-1 at 3.) After receiving inadequate and
24 untruthful responses, Plaintiffs engaged in an extensive meet-and-confer effort
25 lasting over seven months. (*Id.* at 3-4.) Ultimately, on July 13, 2017, the Court
26 ordered the Ferraras to produce documents. (Dock. No. 267.) The Ferraras failed to
27 comply with the July 13, 2017 Order, however, forcing Plaintiffs, on August 14,
28 2017, to file a motion for monetary sanctions. (Dock. No. 403.) On August 22,

1 2017, Plaintiffs also filed a motion for evidentiary sanctions against the Ferraras and
2 Sang Lee, setting the matter to be heard before Judge Otero. (Dock. No. 425.)

3 On August 23, 2017, Judge Oliver granted Plaintiffs' monetary sanctions
4 motion with respect to Defendants' failure to comply with the Court's July 13, 2017
5 Order. (Dock. No. 432.) Judge Oliver directed Plaintiffs to submit a declaration
6 detailing their expenses incurred as a result of the Ferrara Defendants' failure to
7 comply with the Court's July 13, 2017 Order. (*Id.*)

8 Plaintiffs and the Ferraras then resolved the amount of monetary sanctions to
9 be paid and, on September 5, 2017, Plaintiffs filed the Declaration of Samantha
10 Wolff describing the resolution. (Dock. No. 444.) Per the agreement, counsel for
11 the Ferraras paid Plaintiffs' counsel \$32,137.50. Plaintiffs advised the Court that
12 they "no longer seek the Court's assistance in determining the amount to be awarded
13 for Defendants' failure to comply with this Court's July 13, 2017 Order" and stated
14 they would "not seek any further monetary sanctions from the Court for the alleged
15 spoliation of evidence raised in Plaintiffs' Monetary Sanctions Motion." (*Id.* at ¶ 5.)

16 On August 28, 2017, Judge Otero referred Plaintiffs' evidentiary sanctions
17 motion (Dock. No. 425) and other pending matters to Judge Oliver for a Report and
18 Recommendation. (Dock. No. 435.) On September 19, 2017, Judge Oliver issued
19 an Order setting a briefing and hearing schedule. (Dock. No. 461.)

20 On October 12, 2017, after the matter was fully briefed, Judge Oliver held a
21 hearing. (*See* Dock. Nos. 468, 472, 473, 477, 478, 489.) At the hearing, Judge
22 Oliver asked counsel for the Ferraras, Alison Hurley, what would be an appropriate
23 sanction if the Court did not find intent to deprive Plaintiffs of electronic evidence,
24 but found that Defendants' actions prejudiced Plaintiffs. (Wolff Decl., Ex. 1 at
25 70:2-9.) Ms. Hurley responded that a monetary sanction could be sufficient, but
26 because Defendants already paid a monetary sanction, the sanction should be
27 permitting Plaintiffs to argue Defendants' evidence spoliation at trial. (*Id.* at 70:10 -
28 71:5.) Judge Oliver then observed that the prior sanctions order was directed at

1 “compensating [Plaintiffs] for costs incurred and associated with having to bring
 2 [the Ferrara Defendants] in to compliance with the Court’s order” and that spoliation
 3 was a different issue. (*Id.* at 70:18-71:12.) Judge Oliver also noted that Plaintiffs
 4 already would be entitled to argue evidence spoliation at trial. (*Id.*) Ultimately, Ms.
 5 Hurley argued that the sanction for her clients’ violation of Rule 37(e)(1) should be
 6 “no sanction” or the denial of their summary judgment motions. (*Id.* at 72:17-20.)

7 On October 20, 2017, Judge Oliver issued her Report and Recommendation,
 8 concluding as follows:

9 (1) both Ferrara Defendants failed to take reasonable steps
 10 to preserve ESI, which should have been preserved in the
 11 anticipation or conduct of litigation, and the ESI was lost
 12 as a result and cannot be restored or replaced through
 additional discovery;

13 (2) without additional evidence of intent (which Plaintiffs
 14 had not been able to obtain due to Defendants’ conduct),
 severe sanctions under Rule 37(e)(2) were not warranted¹;

15 (3) Plaintiffs have suffered prejudice in having to oppose
 16 summary judgment motions without this potentially
 relevant evidence;

17 (4) Plaintiffs will be prejudiced at trial by not being able to
 18 present or rely on the contents of the missing text
 19 messages and by being without any records of phone calls
 20 or text messages exchanged during a “highly relevant
 21 period of time surrounding the alleged incidents of
 harassment of the named Plaintiffs.”

22 (Dock No. 496, pp. 25-28.)

23
 24 ¹ Because Charlie and Frank Ferrara were deposed before Plaintiffs learned of their
 25 unrecoverable text messages, the Court determined that “[i]t would be unfair to
 26 expect Plaintiffs to have been able to fully probe spoliation and the intent behind the
 27 destruction or failure to preserve evidence when Plaintiffs were unaware that any
 28 evidence previously in possession or under control of the Ferrara Defendants was
 unrecoverable.” (*Id.* at p. 27:6-10.)

1 To cure Plaintiffs' prejudice caused by the Ferraras' spoliation, Judge Oliver
 2 recommended they pay monetary sanctions and Plaintiffs' expenses associated with
 3 deposing Frank and Charlie Ferrara a second time, which will allow Plaintiffs "to
 4 fully explore the spoliation issues and the level of culpability or intent behind the
 5 failure to preserve text messages and cellular phone bill records." (*Id.* at 30.) Judge
 6 Oliver also recommended further submissions by the parties to determine the
 7 amount of monetary sanctions, including Plaintiffs' costs and fees to re-depose
 8 Frank and Charlie Ferrara. (*Id.* at pp. 30-31.) Judge Oliver also recommended that,
 9 after further depositions, Plaintiffs "be permitted to submit evidence concerning
 10 what evidence was destroyed, when the Ferrara Defendants had notice of the
 11 litigation, and the Ferrara Defendants' intent with regard to the destruction of
 12 evidence." (*Id.* at p. 31.)

13 **III. ARGUMENT**

14 **A. The Court Has Broad Discretion To Award Sanctions.**

15 Where prejudice results from a party's spoliation of ESI, a Court "may order
 16 measures no greater than necessary to cure the prejudice." Fed. R. Civ. P. 37(e)(1).
 17 A sanctions award "can range from minor sanctions, such as the awarding of
 18 attorneys' fees, to more serious sanctions, such as dismissal of claims or instructing
 19 the jury that it may draw an adverse inference." *Blumenthal Distr., Inc. v. Herman*
 20 *Miller, Inc.*, 2016 WL 6609208, *2 (C.D. Cal. July 12, 2016) (quoting *Apple Inc. v.*
 21 *Samsung Electronics Co., Ltd.*, 881 F. Supp. 2d 1132, 1135 (N.D. Cal. 2012)).
 22 Further, "[a]ny sanction must be the least drastic available to adequately mitigate
 23 the prejudice suffered." *Id.* (quoting *Apple Inc.*, 881 F. Supp. 2d at 1150).

24 Here, based upon the Court's determination that the Ferraras violated Rule
 25 37(e)(1) and prejudiced Plaintiffs, Judge Oliver appropriately recommended a
 26 sanction designed to mitigate the prejudice. Because more information is needed to
 27 infer Defendants' intent (given that Plaintiffs were not made aware of the Ferrara's
 28 spoliation until after both Defendants were deposed), Judge Oliver recommended

1 that Plaintiffs have the opportunity to conduct further depositions of Defendants.
 2 (Dock. No. 496, p. 30.) Judge Oliver also recommended that the expenses
 3 associated with these depositions be borne by the Ferraras as a sanction. (*Id.*)

4 As another consequence of the Ferraras' conduct, Judge Oliver recommended
 5 additional monetary sanctions "in order to cure, in part, the prejudice to Plaintiffs
 6 from the spoliation." (*Id.*) Judge Oliver observed that the parties' prior agreement
 7 with respect to fees did not preclude this award. (*Id.*)

8 The fact that Plaintiffs did not specifically request reimbursement for fees
 9 incurred since resolution of their monetary sanctions motion is irrelevant. Plaintiffs
 10 sought relief for spoliation and "the court's discretion regarding the form of a
 11 spoliation sanction is broad." *Blumenthal Distr.*, 2016 WL 6609208 at *22.
 12 Moreover, the Ferraras were notified and provided an opportunity to specifically
 13 address the monetary sanctions as a "lesser remedy." (Wolff Decl., Ex. 1 at 70-72.)
 14 Further, the Report and Recommendation, if adopted by this Court, anticipates
 15 "further submissions by the Parties" regarding the amount of the award. (Dock. No.
 16 496, 30-31.) Thus, the Report and Recommendation should be adopted in full.

17 **IV. CONCLUSION**

18 Having determined that Plaintiffs have been and will continue to be
 19 prejudiced by the Ferraras' spoliation of evidence, Judge Oliver properly considered
 20 and awarded "measures no greater than necessary to cure the prejudice." Fed. R.
 21 Civ. P. 37(e)(1). Plaintiffs never agreed to limit the Court's authority in this regard
 22 (nor could they). Accordingly, the Ferraras' objections should be overruled, and the
 23 Report and Recommendation should be adopted in full.

24 DATED: November 14, 2017

HANSON BRIDGETT LLP

26 Bv: /s/ Samantha Wolff
 27 SAMANTHA D. WOLFF
 Attorneys for Plaintiffs